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IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC14-897

JOHN ROBERT SEBO,
individually and as Trustee under Revocable Trust Agreement of John Robert Sebo dated November 4, 2004,

Petitioner,

vs.

AMERICAN HOME ASSURANCE COMPANY, INC.,

Respondent.

PETITIONER'S BRIEF IN SUPPORT OF JURISDICTION TO REVIEW A DECISION OF THE DISTRICT COURT OF APPEAL FOR THE SECOND DISTRICT OF FLORIDA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions & Statutes

Other Sources

STATEMENT OF THE CASE AND FACTS

John Robert Sebo obtained a jury trial judgment of more than $8,000,000 representing property damage to his home caused by rain and wind. The home also had construction defects. The Second District reversed and ordered a new trial, expressly rejecting extant Florida law on multi-peril liability. That law – the concurrent causation doctrine – set forth in *Wallach v. Rosenberg*, 527 So. 2d 1386 (Fla. 3d DCA 1988) has since been consistently applied by Florida courts (and federal courts applying Florida law) until it was expressly and directly repudiated by the Second District, which wrote: "[w]e disagree with the rule stated in *Wallach* and applied by the circuit court in this case." Slip op. at 12 (Appendix).

The trial utilized the *Wallach* concurrent cause doctrine. Sebo sued American Home Assurance seeking a declaratory judgment to establish coverage for the total loss of his home under a policy "created specifically for the Sebo residence." Slip op. at 2.

> The policy covered "all risks of physical loss or damage to your house contents, and other permanent structures unless an exclusion applies" resulting from "occurrences."

Id. at 4.

"There is no dispute in this case that there was more than one cause of the loss [of the home] including defective construction, rain and wind." *Id*. at 5. Rain and wind were covered by the policy, but "defective construction . . . was excluded

from coverage." *Id*. at 5-6. Significantly, although other exclusions in the policy contained "anti-concurrent cause" language designed to reconcile conflicts in a multi-peril liability claim against coverage, the defective construction exclusion did not. Sebo successfully sought summary judgment pursuant to *Wallach's* concurrent causation standard:

> Under that doctrine when multiple perils act in concert to cause a loss, and at least one of the perils is insured and is a concurrent cause of the loss, even if not the prime or the efficient cause, the loss is covered.

Id. at 5.

American Home maintained "that the perils at play in this case were dependent" and that the concurrent causation doctrine did not apply. *Id*. at 6. American Home did not contest the continuing viability of the concurrent cause doctrine; rather it argued that the doctrine was inapplicable to the facts of Sebo's loss.

The Second District did not address American Home's argument that the doctrine should not apply based on the facts of the case. Instead, the court rejected the doctrine in its entirety stating: "because, as we explain below, we disagree with *Wallach's* determination that the concurrent cause doctrine should be applied in a case involving multiple perils and a first party insurance policy." *Id*. In its place, the Second District substituted the "efficient proximate cause" theory of *Garvey v. State Farm Fire & Casualty Co*., 770 P. 2d 704 (Cal. 1989), (*id*. at 9), sending

Sebo back to trial to have the jury determine the efficient proximate cause, i.e., "which peril was the most substantial or responsible factor in the loss. If the policy insures against that peril, coverage is provided." Slip op. at 6.

Thus this case, which began in 2007, was sent back to be tried again on a theory of liability never raised by the insurance company, but now invoked by the appellate court's *sua sponte* rejection of established Florida law.

SUMMARY OF THE ARGUMENT

When a district court of appeal explicitly "disagrees" with a decision of another district court of appeal and engages in a long explanation of its reasons for rejecting the other court's holding, "express and direct" conflict exists under Article V, § 3(b)(3) of the Florida Constitution and Rule 9.030(a)(A)(iv), Florida Rules of Appellate Procedure. "Express" means to communicate, convey or indicate. "Direct" means straight and undeviating. The decision below, rejecting the *Wallach v. Rosenberg*, 527 So.2d 1386 (Fla. 3d DCA 1988) concurrent causation principle is a textbook example of express and direct conflict. The Second District's stated disagreement with *Wallach* left no doubt that in its view, *Wallach* was extinct and would not be followed. This Court should exercise its jurisdiction to resolve the conflict. Only this Court can say whether *Wallach* is good law, or not the law in Florida.

ARGUMENT

THE CONFLICT BETWEEN *SEBO* AND *WALLACH* PRESENTS AN IMPORTANT QUESTION THAT REQUIRES RESOLUTION BY THIS COURT

That there is express and direct conflict is certain. The conflict has the potential to create instability in Florida law.

Wallach's holding is "that the jury may find coverage where an insured risk constitutes a concurrent cause of the loss even where 'the insured risk [is] not . . . the prime or efficient cause of the accident." The Third District cited 11 G. Couch, *Couch on Insurance 2d* § 44:268 (rev. ed. 1982) and noted the adoption of that view by an *en banc* California Supreme Court decision. *Wallach*, 527 So. 2d at 1387.

Judge Peter Fay, writing for a panel of Florida judges (Susan Black and Stanley Marcus), cited *Wallach* approvingly and quoted in full the *Wallach* holding in *GuideOne Elite Ins. Co. v. Old Cutler Presbyterian Church, Inc.*, 420 F. 3d 1317, 1330 (11th Cir. 2005). In *Paulucci v. Liberty Mutual Fire Insurance Co.*, 190 F. Supp. 2d 1312 (M.D. Fla. 2002), the court applied *Wallach* and concluded:

> *1. The Concurrent Case Doctrine is the Prevailing Standard in Florida When Multiple Perils Are Independent.*
>
> As set forth by Florida's Third District Court of Appeal in *Wallach v. Rosenberg*, 527 So. 2d 1386 (Fla. 3d DCA 1988), the concurrent cause doctrine is the prevailing standard under Florida law.

Id. at 1318 (emphasis in original).

In a multi-page analysis, the *Paulucci* court rejected Liberty Mutual's assertion "that *Wallach* is an anomaly and that . . . the 'efficient proximate cause doctrine'" is the prevailing standard. *Id*. The court continued: "In doing so I adhere to the sound reasoning of Florida's Third District Court of Appeal in *Wallach*. . . ." *Id*. at 1319. Judge Duffy rejected *Garvey v. State Farm Fire & Casualty Co.*, 770 P.2d 704 (Cal. 1989), the case that the Second District followed here, pointing out that California's efficient proximate cause doctrine "is rooted in a state statutory scheme that has been thoroughly interpreted by California courts." Since that is not the case in Florida, Judge Duffy rejected reliance on *Garvey*. The Second District's embrace of *Garvey* and California law, and displacement of *Wallach*, was wrong.[1]

The Respondents may oppose jurisdiction claiming the *Wallach* concurrent causation holding was unnecessary to its decision; that the "*Wallach* court plunged into the argument to address the issue." *See*, American Home Assurance Company's Response to Appellee's Motion to Stay Insurance and Mandate in the Second District, p. 6. That notion of "dicta" is belied by the words of *Wallach*,

[1] In rejecting *Wallach*, the court eroded longstanding Florida law articulated by this Court in *Fayad v. Clarendon National Ins. Co.*, 899 So. 2d 1082 (Fla. 2005), a decision that cited *Wallach* and made clear that "'exclusionary clauses are construed even more strictly against the insurer than coverage clauses.'" *Id*. at 1086 (*citing Auto-Owners Ins. Co., v. Anderson*, 756 So. 2d 29, 23 (Fla. 2000)). *Wallach* followed those principles.

which make it clear that the court was responding to an argument which was presented as a basis for reversing the trial court. *Wallach* wrote: "The Appellants' second contention is that where concurrent causes join to produce a loss and one of the causes is a risk excluded under the policy, then no coverage is available to the insured. We reject that theory and adopt what we think is a better view – [the concurrent cause doctrine]." 527 So. 2d. at 1387. That is not "dicta;" it is a clear holding on a disputed issue before the Court.

The rejection of that holding presents the basis for jurisdiction in this Court.

CONCLUSION

There is no impediment to conflict jurisdiction. Decisions subsequent to *Wallach*, save for *Sebo* below, have established and accepted the *bona fides* of *Wallach's* concurrent cause approach to multi-peril claims. The issue is important to every property owner and every insurer in the State of Florida. Unsettled law is anathema to both property owners and insurers. This Court should accept jurisdiction to resolve the conflict between *Sebo* and *Wallach*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of May, 2014, pursuant to Fla. R. Jud. Admin. 2.516, a true and correct copy of this Brief has been served via e-filing Portal to:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief is in compliance with Rule 9.210, Fla.R.App.P., and is prepared in Times New Roman 14 point font.

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